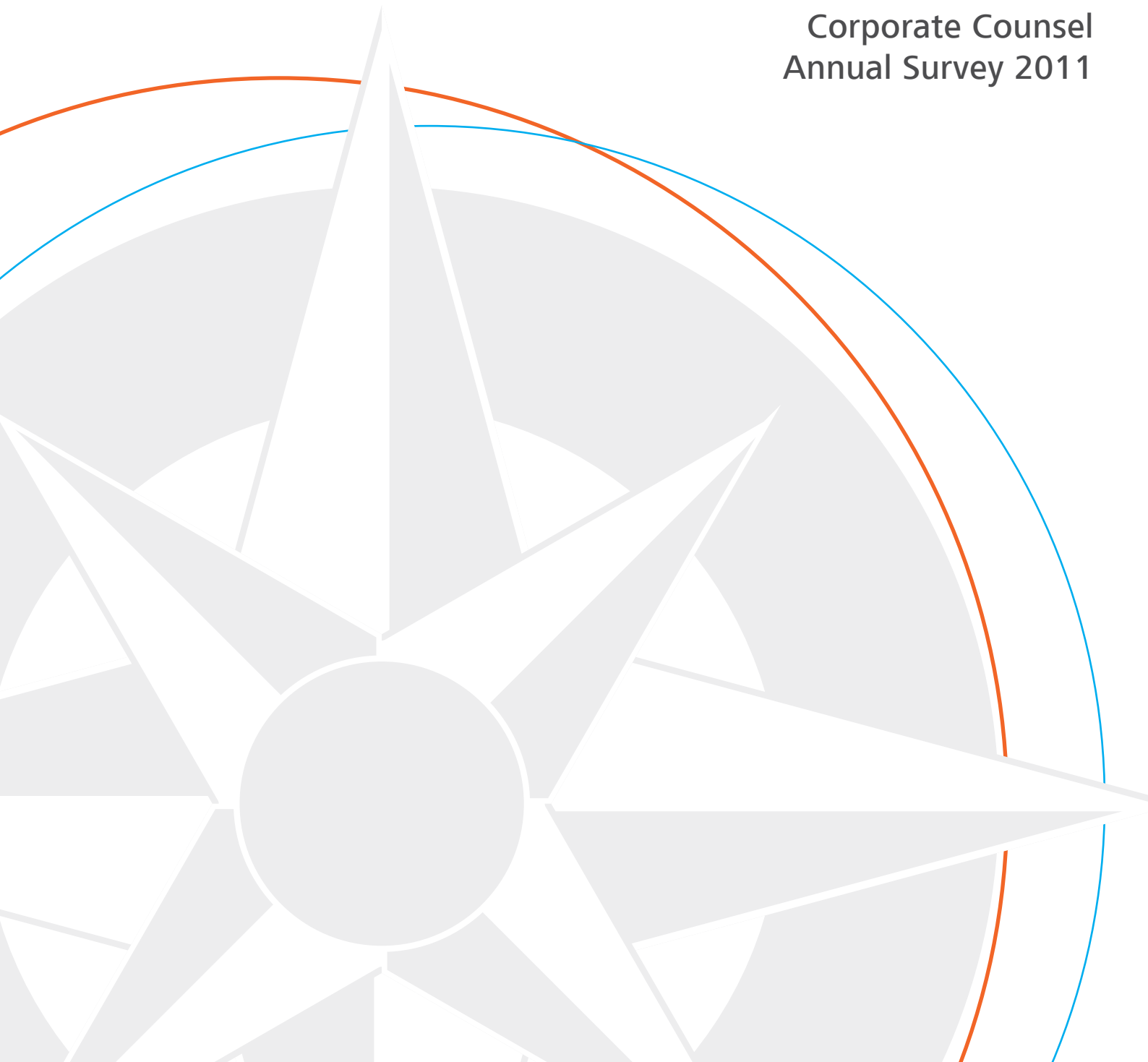


MALLESONS STEPHEN JAQUES



Corporate Counsel
Annual Survey 2011





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INTRODUCTION

Large organisations rely on their corporate counsel to navigate their way through Australia's complex regulatory landscape. Increasingly, they are also looking to corporate counsel for more than legal advice. The role of corporate counsel is continuously evolving, growing more complex and becoming increasingly important in corporate decision making.

In June 2011, Mallesons undertook an online survey of Australian based corporate counsel to explore current opinions on a variety of issues. This report analyses the results of the survey and trends that may emerge in the year ahead.

In particular, we look at:

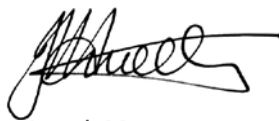
- the current and changing responsibilities of corporate counsel
- managing the legal function, relationships with external firms and attitudes to different fee arrangements
- top of mind regulatory issues
- attitudes to the law reform process
- specific issues, such as executive remuneration, continuous disclosure and class actions.

We have prepared our report in partnership with four General Counsel of major Australian companies - Nathan Butler (National Australia Bank), Paul Meadows (Wesfarmers), Brian Salter (AMP) and Simon Tuxen (Westfield). We thank each of them for their support and invaluable input. We also express our appreciation to Graham Bradley (Chair, Business Council of Australia) and Paul McClintock (Chair, COAG Reform Council) for their insights on aspects of this report.

We hope you find the report informative and welcome your feedback for future Compass surveys and reports.



Jason Watts
Partner
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KEY THEMES

Corporate counsel today

day-to-day legal work is still key

increased focus on commercial and strategic issues

broader role than ever

the billable hour is still the predominant method of billing

Managing the internal and external legal function

regular law firm review to reduce cost and maintain competitive tension

larger in-house legal teams

active
regulatory
enforcement

over
regulation is
constraining
corporate
Australia

Regulatory compliance and law reform

regulators
need better
understanding
of industry

industry-
specific and
competition
concerns

class actions
are a significant
concern

Specific regulatory issues

executive
remuneration
reforms are overly
complex and
uncommercial

differing
perspectives
between corporate
counsel and directors
on the issue
of continuous
disclosure

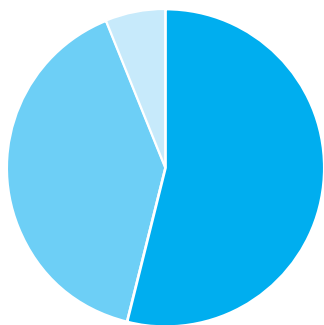
Our survey sample

- 374 survey respondents
- 44% were General Counsel
- 45% in the ASX 200
- more than 20 industries represented with strong representation from the financial services and banking industries (24%)



CORPORATE COUNSEL TODAY

What do you expect to happen to the size of your legal team over the next three years?



- 54% Expect it to increase
- 40% Expect no change
- 6% Expect it to decrease

Cost pressures and increasing regulatory responsibilities are driving growth of in-house teams

Ongoing market turbulence has prompted organisations to dramatically reduce their costs and tighten budgets - including legal budgets. Many organisations have attempted to curb their external legal spend by keeping more legal work in-house.¹ Survey respondents nominated cost reduction as one of the main drivers for the steady growth of their legal departments. Survey respondents expect this trend to continue with 94% expecting stable or increasing in-house legal teams over the next three years.

Our General Counsel survey partners acknowledged cost reduction as a driver for growing in-house legal teams, but some noted that larger in-house teams do not automatically reduce costs. An equally effective approach is to maintain a relatively small in-house team of very senior lawyers who work closely with a range of firms depending on the nature and complexity of the work involved.

Another key driver is the increasingly regulated business environment - regulatory and compliance work ranks highly as one of the key responsibilities for corporate counsel.

Our General Counsel survey partners suggest that increasing segmentation of the legal market has also contributed to growing in-house legal teams. Sophisticated corporates are assessing what types of work can be more effectively and efficiently conducted in-house where industry specific experience can be developed by those with a deeper day-to-day knowledge of the organisation's operations.

The prospect of future growth within in-house legal teams appears most likely in the mining industry where 70% of respondents expect their legal teams to increase in size, with "business growth" stated as the key reason.

"Legal function is expanding into non traditional areas such as project management and business planning and strategy".

Compass 2011 survey respondent

¹ See, for example, Low H, Australian Financial Review, *Lawyers look in-house for value*, 23 July 2010, page 40; Bowers S, The Australian Financial Review, *How to rein in the company budget: keep work in-house*, 3 June 2011, page 43

Day-to-day legal work and legal risk management occupy most of a corporate counsel's time

Today, corporate counsel do more than provide legal advice. In many organisations, the General Counsel is a key member of the executive team.

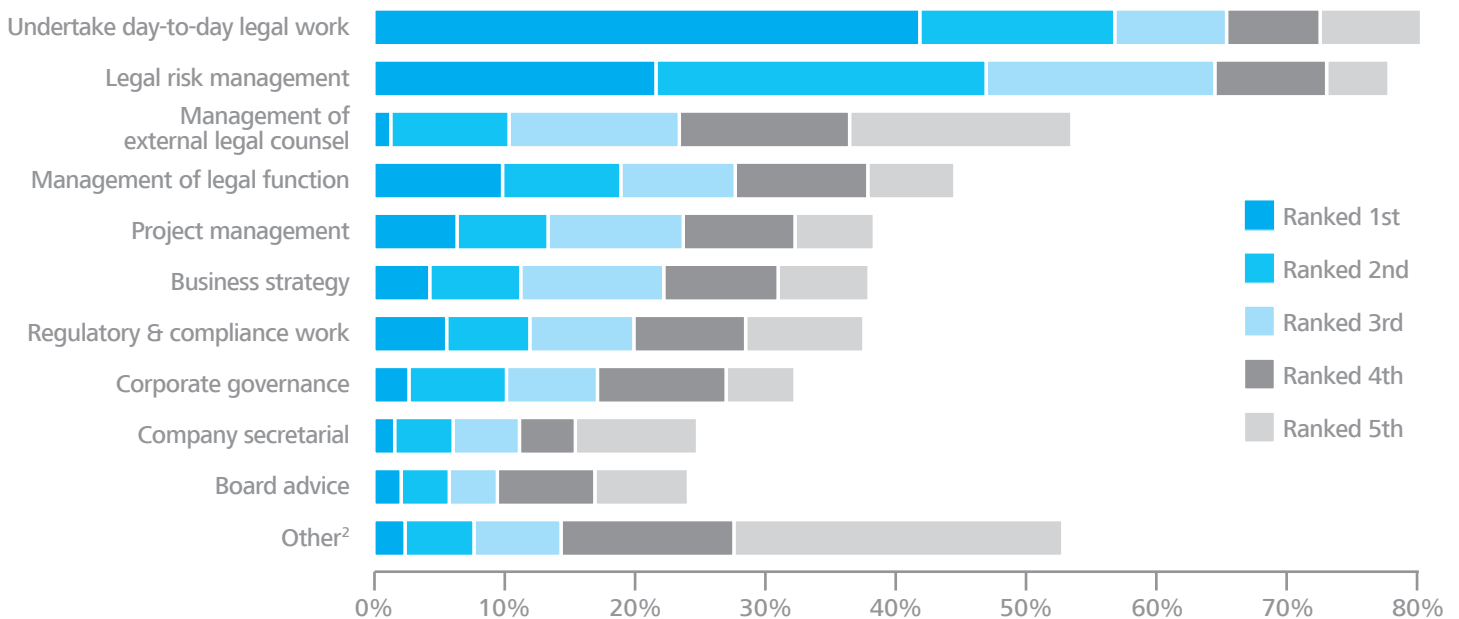
Despite a growing list of responsibilities, our survey results demonstrate that day-to-day legal work and legal risk management continues to occupy most of a corporate counsel's time.

Results for both General Counsel and other members of the legal team were generally similar except that General Counsel of the ASX 200 companies ranked management of the legal function and legal risk management as the two top responses, followed by undertaking day-to-day

legal work and business strategy. The larger the organisation (and the larger the size of the in-house team) the more likely the senior members of the team are to spend more time on management and risk related matters.

One of our General Counsel survey partners thought that senior executives expect their in-house lawyers to take a more hands on approach to their work. This also mirrors the trend in private practice where there is an increasing expectation from clients for partners of external law firms to be more involved in the day-to-day aspects of matters and work closely with the in-house team.

In your role as corporate counsel, which of the following responsibilities occupy most of your time?



² 'Other' includes managing relationships with regulators, regulatory policy and law reform work, investor relations and sustainability

“The environment is constantly changing and there is the ongoing challenge of seeking to communicate with influence”.

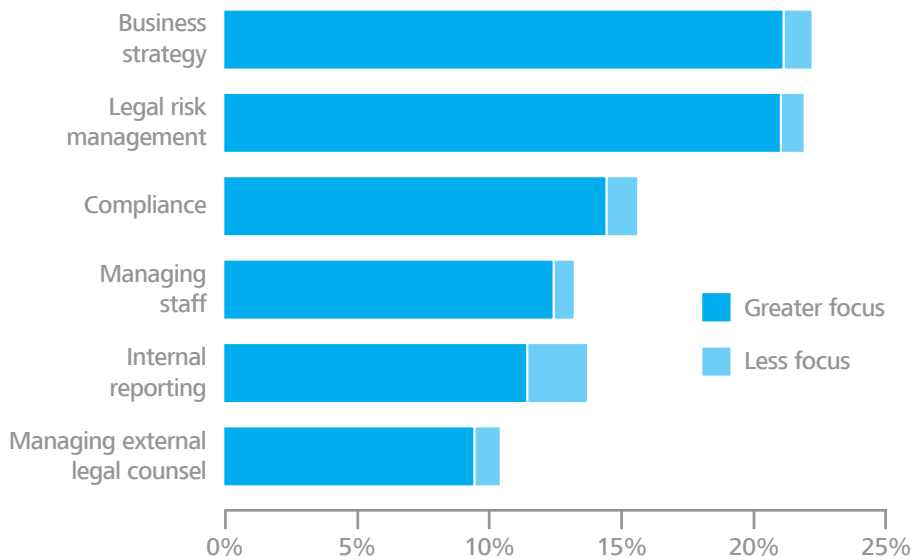
Compass 2011 survey respondent

The increasing focus on a diverse range of responsibilities has resulted in increased pressure on the work loads of many corporate counsel

When asked how their role has changed in the last three years, the majority of survey respondents indicated a greater focus on business strategy and legal risk management.

Survey responses were consistent among General Counsel and other members of the legal team, highlighting the growing expectations faced by all members of the legal team to expand beyond a purely legal role.

How has your role changed in the last three years?



MANAGING THE INTERNAL AND EXTERNAL LEGAL FUNCTION

Regular reviews of external law firms are seen as key to controlling costs and maintaining competitive tension among firms

There are many reasons to use more than one external law firm - maintaining competitive tension between firms on pricing and quality, reducing the risk of being held captive to one firm, managing conflict issues and leveraging specialist skills and capabilities across firms.

More than half of our survey respondents (52%) stated that their organisation undertook a review of legal advisors in the last 12 months. For some, this was part of the ordinary review cycle (26%) while others (25%) indicated this was to reduce legal costs.

ASX 200 companies were more likely to review panel arrangements. Our General Counsel survey partners see this as a natural consequence of these companies having greater infrastructure to support regular panel reviews and potentially greater bargaining power. However, one of our General Counsel survey partners expected that in today's economic climate, more organisations would have taken the opportunity to conduct panel reviews to secure better deals from firms.

The billable hour is still the predominant method of billing

The merits of time-based billing for legal services have long been debated - the major criticism being that time-based billing rewards efforts and not results.³ Many, including members of the judiciary and the Federal Attorney-General, have recently advocated a shift to value-based billing.⁴

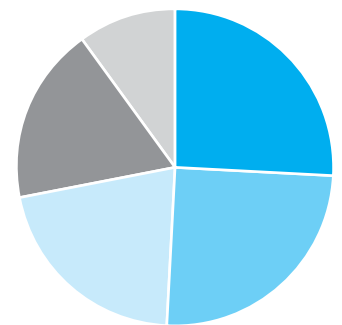
Despite the debate, our survey results suggest a reluctance by survey respondents to move away from time-based billing. Half of the survey respondents said that fees billed at an hourly rate accounted for more than 90% of their legal spend.⁵

Fees billed at an hourly rate	%
Greater than 90%	50%
50% to 90%	40%
Less than 50%	10%

Has this % changed in the last two years?	%
No	55%
Yes, it has decreased	29%
Yes, it has increased	16%

Are you satisfied with billing arrangements?	%
Yes	66%
No	34%

If there has been a review of law firms used by your organisation what was the main reason for this?

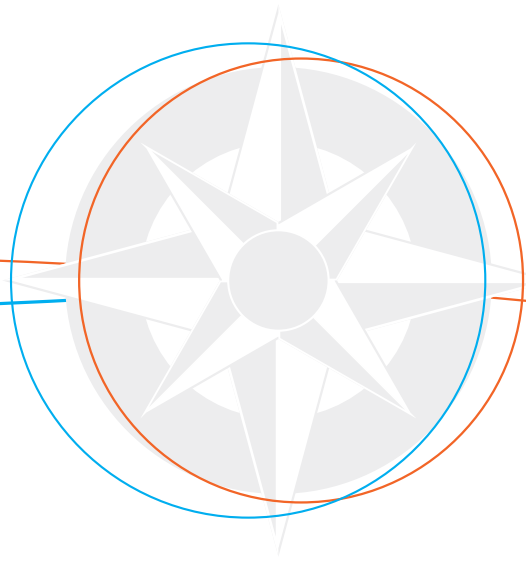


- 26% Part of ordinary review cycle
- 25% Reduce legal costs
- 21% Capability review
- 18% Performance review
- 10% Reduce the number of firms on the panel

³ See, for example, Slattery P, The Australian, *The time-based billing debate is not a matter of good versus evil*, 29 April 2011

⁴ Kitney D, The Australian, *Leading silk lashes lawyers' time billing*, 16 April 2011

⁵ The numbers are broadly the same among the range of organisations represented by the survey respondents



“It is a little surprising to see such strong support for hourly billing given our own experience of the number of clients who are interested in exploring alternative arrangements. While I believe the pricing paradigm is changing, the survey results suggest to me that in-house teams and external law firms need to work more closely on developing win-win alternatives if we are to see a genuine shift over time”.

Tony O'Malley, *Managing Partner*, Mallesons Stephen Jaques

55% of survey respondents stated that the proportion of fees billed on an hourly rate basis had not changed in the last two years and 16% said it had increased.

At the same time, 29% of respondents said it had decreased, suggesting the way forward might be a gradual move away from the traditional billable unit.

While commentators on this issue would have us believe that an overwhelming majority want to do away with billable hours, almost two thirds of survey respondents said they were happy with their current billing arrangements. Our General Counsel survey partners suggest the reasons for the prevalence of the billable hour might be:

- a combination of inertia, time and effort - many corporate counsel are comfortable with hourly billing and do not want to add to their already full work loads by having to regulate and monitor alternative arrangements⁶
- it is difficult to implement alternative billing arrangements for more complex matters in a way that balances the value of the work with an appropriate risk/reward matrix for the client and the law firm

- a more sophisticated market has driven segmentation of legal services - this has driven a move to alternative billing arrangements for high volume/routine commoditised legal tasks rather than across the board.

Our General Counsel survey partners are wary of “investment bank” style fee structures if a move is made to value-based billing and query their appropriateness for legal services.

On the whole, our General Counsel survey partners considered that corporate legal services are reasonably priced in Australia compared to other jurisdictions.

⁶ This view is consistent with commentary from consultant Richard Stock who believes “that while General Counsel and law firms might be overwhelmingly in favour of introducing alternative fee arrangements, they are too comfortable to shake up their relationships to do so; ... the players are accustomed to a certain way of doing things.” Priestley A, *Lawyers Weekly, Cosy client relationships lead nowhere*, 18 August 2010

Fixed and capped fees are a useful way of managing external legal spend but are not suitable for all situations

When asked to rank their top three alternative billing arrangements, the most popular among survey respondents were fixed fees (82%) and capped arrangements (79%), followed by volume-based discounting (58%).

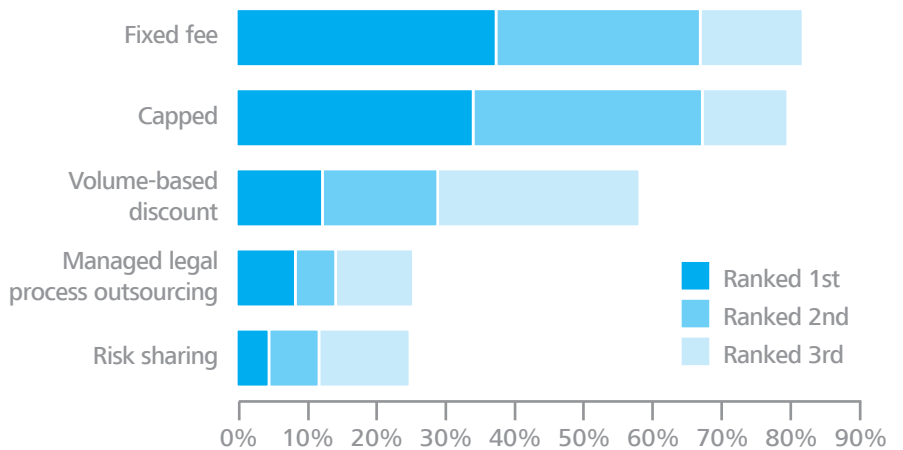
Despite the desire by many corporate counsel to have more fixed and capped fees, the survey results suggest they are not currently widely used. Some corporate counsel see fixed fees as only having been effective in pricing commoditised work. Further, fixed fee arrangements can be meaningless if the quote is so narrowly scoped that the fee may as well not be fixed. Also, as noted by one of our General Counsel survey partners, if not properly managed, a fee cap or fixed fee can backfire if it operates as a disincentive for external advisers once the cap or fixed amount is reached.

Interestingly, despite recent media attention on ‘all you can eat’ fee arrangements, **no** survey respondents thought it was an effective way of managing external legal spend. Our General Counsel survey partners were wary of these arrangements as they require a commitment to deliver a certain amount of work to a particular firm whereas they value the flexibility of choosing the right firm for the job.

Outsourcing is yet to take off in Australia

Legal process outsourcing did not rank highly on the list of alternative billing arrangements. The trend in the US and the UK to outsource certain commoditised and administrative legal work to cheaper labour markets such as India is not without concerns. These concerns include confidentiality for clients and that costs saved on outsourcing are often offset by the time spent supervising, managing and having to redo some of that work.⁷ There are even reports in the US of firms bringing work back from outsourced destinations.⁸

What alternative fee arrangements do you find most effective for managing your external legal spend?⁹



“Alternative fee arrangements are not solely about clients paying less, they are more about developing strategic relationships that give win-win results”.

Compass 2011 survey respondent

⁷ Priestley A, Lawyers Weekly, *Lawyers on Tap*, 31 March 2010
⁸ Qualters S, “Outsourcing pioneer blazes a new trail: Bringing work back from India”, *The National Law Journal*, 5 July 2011
⁹ Next fee arrangements were; other, no win no fee, and all you can eat



REGULATORY COMPLIANCE

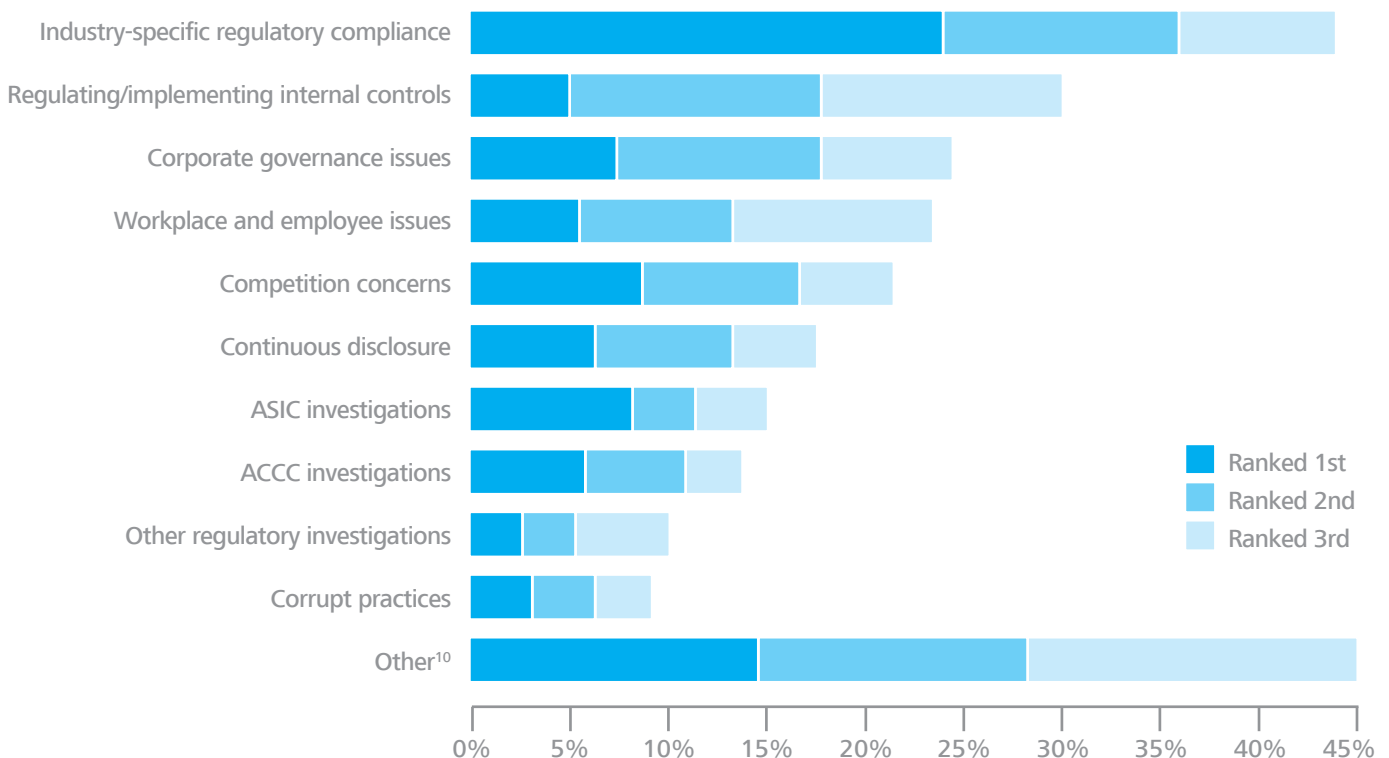
Corporate counsel often oversee the regulatory compliance function. As expected, the survey results show that the continuing growth of complex regulation and its enforcement has directly affected the role of corporate counsel.

The fact that industry-specific regulation is occupying the minds of most survey respondents is no surprise given that survey respondents also ranked State/Federal harmonisation and reduction of red tape as being the areas most in need of law reform.

There is a focus on every-day compliance issues

The four most significant compliance issues for survey respondents were industry-specific compliance, regulating/implementing internal controls, corporate governance and workplace/employee issues. This is consistent with our findings that day-to-day legal work and legal risk management occupy most of survey respondents' time.

What are the top three compliance issues which have been of most concern to you over the last 12 months?



¹⁰ 'Other' includes financial/periodic disclosures, executive remuneration, class actions, carbon emissions policies, product liability, ATO investigations and ASX best practice guidelines

Competition concerns

Over one fifth of survey respondents ranked competition concerns as one of their top three compliance issues. Together with the high ranking of Australian Competition and Consumer Commission (ACCC) investigations, this reflects:

- the effect of significant reforms to competition laws in recent years including the introduction of criminal penalties for cartel behaviour, the commencement of the Australian Consumer Law (ACL) and proposed price signalling reforms
- a heightened awareness of the consequences of breaching competition laws, given recent penalties (\$14 million against Cabcharge in 2010, \$36 million against Visy and \$1.5 million against its CEO in 2007) and damages paid in settlement of class actions (\$95 million in the Amcor/Visy cartel class action).

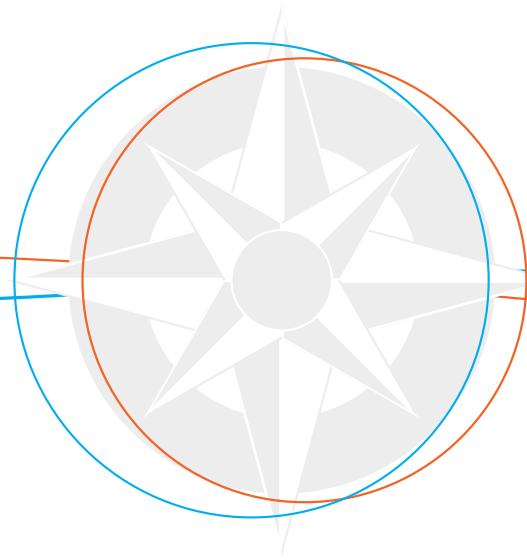
Corporate counsel do not currently have a strong focus on financial reporting issues, but for how long?

One notable difference between the findings in Mallesons' 2011 survey of non-executive directors, *Directions 2011*, and this survey, is that non-executive directors generally found financial reporting compliance and disclosure a greater concern than corporate counsel.

Following the recent *Centro* decision, we expect the importance of financial reporting compliance and disclosure to become a focus for corporate counsel during the current reporting season.

“Post-Centro I would expect that the legal function in most companies will take a keener interest than previously in ensuring that there is a proper process for documenting the board’s consideration and approval of the accounts”.

Simon Tuxen, *General Counsel*, Westfield



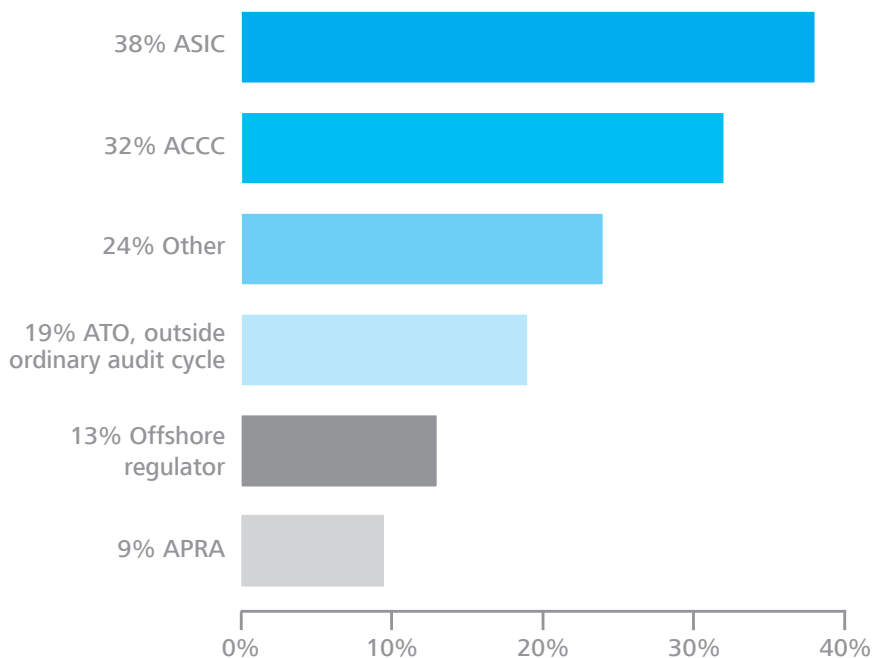
A large number of regulatory investigations

Over 40% of survey respondents said their organisation had been the subject of a regulatory investigation in the last 12 months. The Australian Securities and Investments Commission (ASIC) and the ACCC were the most active regulators, followed by the Australian Taxation Office (ATO).

This reflects a renewed focus by these regulators as well as their ability to compel the production of documents and information and the giving of evidence without the involvement of the courts:

- the ACCC issued 300 statutory notices for the production of information, documents and evidence during 2009/10, issued four search warrants, commenced 32 new sets of proceedings and considered 321 mergers, acquisitions and asset sales¹¹
- in 2009/10, ASIC completed 23 criminal prosecutions and 30 civil proceedings, with 156 matters in total.¹²

If your company has been subject to a regulatory investigation, by who?



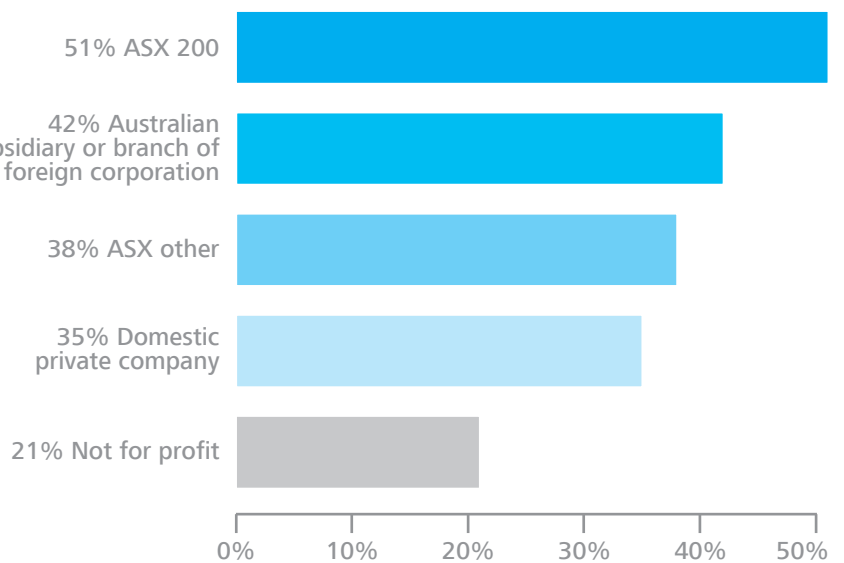
¹¹ ACCC, *Annual Report 2009/10*, pages 39, 42, 46, 55 and Appendix 10
¹² ASIC, *Annual Report 2009/10*, page 16

Changes at the helm of some regulatory bodies are unlikely to change this trend. In his speech to the Australian Prudential Regulatory Authority leadership team in July 2011, new ASIC Chairman, Greg Medcraft, emphasised the proactive role ASIC will take in focusing on gatekeepers including accountants, directors, advisers, custodians, product manufacturers, market operators and participants.¹³

The survey shows that larger corporations have a higher incidence of regulatory investigation.

Reassuringly, most survey respondents whose organisations had been investigated felt they were well prepared to respond. Although, almost half of survey respondents who had been investigated by the ATO (outside of the normal ordinary audit cycle) felt they could have been better prepared.

Subject to a regulatory investigation (by organisation type).



¹³ Medcraft, G, "Speech to Australian Prudential Regulatory Authority leadership team", 30 June 2011, www.asic.gov.au accessed on 14 July 2011

LAW REFORM

Areas in most urgent need of law reform?



- 23% Harmonisation of Federal/State and Territory laws
- 18% Reduction of red tape
- 15% Liability for directors and officers
- 13% Financial services regulation
- 12% Continuous disclosure
- 19% Other¹⁴

A number of criticisms have been made of the volume and effectiveness of the regulation governing Australian businesses. When asked to rank what areas were in most need of law reform, survey respondents sent a clear message about the challenges faced when dealing with different regimes across States and the burden of excessive red tape.

The need for harmonisation of Federal, State and Territory laws

The majority of survey respondents found that the harmonisation of Federal, State and Territory laws is the area most in need of law reform. Different laws for State and Federal regimes in areas such as occupational health and safety, payroll tax and stamp duty laws have a significant impact on the ease and efficiencies of doing business.

The Council of Australian Governments (COAG) recognises that a lack of harmonisation is a significant concern for businesses. It has aimed to increase harmonisation in Australian States and Territories across a number of regulatory 'hot spots', including occupational health and safety and director liability laws.¹⁵ Some progress has been made by COAG in a number of areas but there is clearly a lot of work to do.¹⁶ Harmonisation of regulation is set to remain an issue.

"Having read this section of the report with interest, I agree with the results of the survey that much still needs to be done on harmonising Federal, State and Territory laws. COAG is obviously the right body for this but not enough time or resources are being allocated to the process".

Paul McClintock, *Chair*, COAG Reform Council

"Harmonisation of Federal, State and Territory laws is critical for us to be able to transact and do business confidently and efficiently throughout Australia".

Compass 2011 survey respondent

¹⁴ 'Other' includes class action law, executive remuneration and insolvency law

¹⁵ See the National Partnership Agreement to Deliver a Seamless National Economy at www.coag.gov.au

¹⁶ See the Business Regulation and Competition Working Group, Report Card on progress of deregulation priorities, 13 February 2011 at www.coag.gov.au

Reduction of red tape is a significant priority for business

The second most significant issue for survey respondents is the need to reduce red tape. These results resonated across industries.

In a positive step, a number of Governments at the Federal, State and Territory level have recently shown a greater level of awareness of the need to reduce the level of red tape faced by business and a number of positive steps have been taken to do so.¹⁷

It is clear from the survey results, however, there is still room for improvement at all levels of Government.

There is a continued focus on director and officer liability reform

Industry bodies in recent years consistently argue that the current liability regime for directors acts as a disincentive for people joining or remaining on Boards as well as making directors more risk averse.¹⁸

It is not surprising then that a large number of survey respondents believe that director and officer liability is an area in urgent need of law reform.

“I agree with the concerns raised by respondents. Businesses are operating under increasingly significant amounts of red tape and I feel a better balance needs to be struck between protecting against risks and allowing businesses to function”.

Graham Bradley, *Chair*, Business Council of Australia

In *Directions 2011*, we outlined a number of regulatory changes that directors believe would assist them in discharging their duties, including:

- a broader business judgment rule
- a relaxation of directors’ duties in relation to responsibility for management and third party actions (ie increased ability to delegate).

We expect that there will be further calls for reform following the decision in *Centro*. Market commentary has suggested a need for clear guidance on the circumstances in which directors and officers can rely on the work of delegates.

¹⁷ Business Council of Australia, *2010 Scorecard of Red Tape Reform*, 2010, page 32

¹⁸ See for example the Australian Institute of Company Directors, *Liability laws damaging the economy director survey reveals*, 1 June 2010 and COAG Reform Council *exposes failure of director liability reform*, 11 February 2011 both at www.companydirectors.com.au

There is scope for improvement in law reform

Over 95% of survey respondents thought that the process for law reform could be improved.

A number of survey respondents said that regulators should have a better understanding of the industry that they are regulating. This is consistent with the findings of a number of groups who have assessed the performance of regulators both in Australia and overseas.¹⁹

Some survey respondents were frustrated with the extremely short consultation periods for important regulatory reforms.

This frustration is reflected in the fact that:

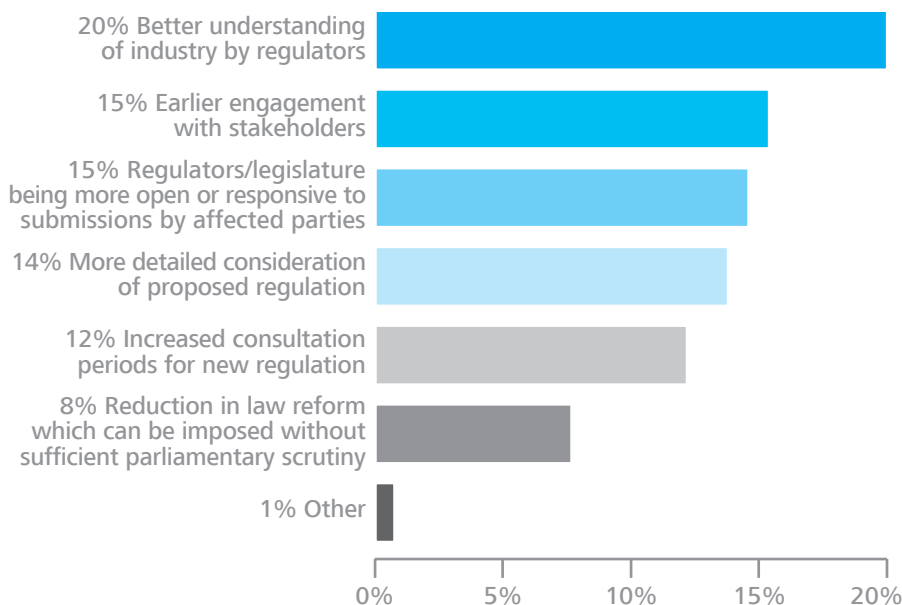
- 12% of survey respondents felt that there should be increased consultation periods for new regulation
- 15% felt that there should be earlier engagement with stakeholders.

This is a worrying trend given that industry is often best-placed to understand the potential impact of proposed regulations. As the BCA recently stated:

*“Governments cannot adequately assess practical implementation issues, the compliance burden, and the costs of a regulatory proposal on business if they are not consulting business or other affected stakeholders in an open and transparent way that allows the opportunity for adequate time to respond”.*²⁰

There were also concerns expressed by survey respondents that regulators were not open or responsive to submissions by affected parties. In some instances our own experience is that submissions appear to have been ignored or had little impact on final outcomes.

If law reform is needed, in what way?



¹⁹ See for example, KPMG, *Building Trust in Regulation* at www.kpmg.com, page 11

²⁰ Business Council of Australia, *2010 Scorecard of Red Tape Reform*, 2010, page 2



**EXECUTIVE
REMUNERATION**

Executive remuneration has been a hot topic over the last two years, with a general perception that ordinary Australians are incensed over generous pay packets offered to senior executives.

There is a policy overload on executive remuneration and the Government's response has been to introduce more prescriptive rules

In December 2009, the Productivity Commission report *Executive Remuneration in Australia* recommended tough governance measures to remove conflicts of interest and promote Board accountability and shareholder engagement. In its April 2011 report *Executive Remuneration*, the Corporations and Market Advisory Committee (CAMAC) made some suggestions to improve reporting on executive remuneration (including remuneration reports) but shied away from setting prescriptive rules on how remuneration should be structured.

In response, the Government introduced a raft of legislative changes, including:

- termination benefits for directors and key management personnel that exceed one year's average base salary requiring shareholder approval²¹
- the introduction of the 'two strikes' rule - Boards will face a spill if they receive votes of 25% or more against their remuneration report at two successive AGMs²²
- prohibitions on key management personnel and their closely related parties from voting on remuneration matters²³
- various amendments to the taxation of employee equity schemes.

"Overly complex and uncommercial. A political knee-jerk reaction to a small number of executives rorting the system which has had a major impact on all listed companies".

Compass 2011 survey respondent

Some of the legislative changes have sound policy rationales, but the changes too often fail in their execution, and poor drafting has resulted in unintended consequences.²⁴

And there is still further change on the horizon. In December 2010, David Bradbury released a discussion paper seeking comments on proposals that would require the clawback of executive remuneration where financial statements are materially misstated.²⁵

"Whilst we support boards setting pay, there has to be accountability".

The Hon David Bradbury MP (Malleasons Market Regulation Forum, 28 June 2011)

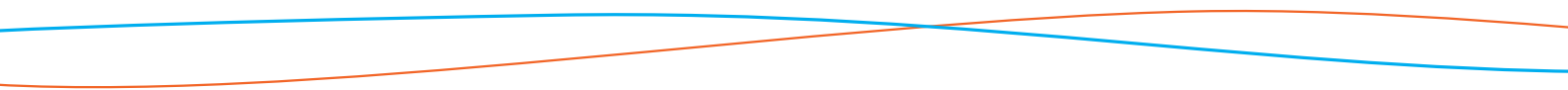
²¹ Part 2D.2 Division 2 of the Corporations Act. These changes were introduced by the Corporations Amendment (Improving Accountability on Termination Payments) Act 2009 (Cwlth) and came into effect on 23 November 2009. Previously, the threshold for shareholder approval of termination benefits was seven years' total remuneration

²² Part 2G.2 Division 9 of the Corporations Act. These changes were introduced by the Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011 (Cwlth) and came into effect on 1 July 2011

²³ New section 250BD and amendments to existing section 250R of the Corporations Act, both of which came into effect on 1 August 2011

²⁴ For example, a chairman should be able to vote open proxies on resolutions to approve a remuneration report - this was clearly the Government's intention but despite submissions made during the consultation process, the legislative drafting is not clear on this point. ASIC issued guidance on 10 August 2011 to help companies deal with the problem until the drafting is fixed

²⁵ APRA has already endorsed a form of 'clawback' policy in its remuneration standards *Prudential Practice Guide PPG 511 Remuneration* which calls for deferral of rewards with adjustment for subsequent performance



With all the changes to executive remuneration in the last few years, most ASX 200 companies have changed their remuneration policies

Over one third of survey respondents and just on two thirds of those from ASX 200 companies surveyed said their organisation had changed its executive remuneration policies in the last three years. Regulatory changes, including industry specific requirements, were cited as a reason for the change.

This is not surprising given the material changes to the regulatory regime surrounding executive remuneration and the salary freezes implemented during the global financial crisis.

The situation is materially different for domestic private companies and Australian subsidiaries, where only 25% and 32% of respondents respectively said their organisation had changed its policies, no doubt reflecting that the regulatory reform to date has focused primarily on listed companies.

The increasing focus on remuneration reports in the wake of the two strikes test suggests that executive remuneration issues will continue to attract attention. It will be a brave Board that ignores a no vote against its remuneration report at an AGM.

“It’s the law now, so we will manage it and I think most companies will”.

Andrew Clarke, *Group General Counsel and Company Secretary*,
Origin Energy (Mallesons Market Regulation Forum, 28 June 2011)



CONTINUOUS DISCLOSURE

When a matter arises which may require disclosure under the continuous disclosure regime, entities must consider whether disclosure is required and, if so, the nature and extent of disclosure and whether it needs to be made immediately. Directors can be asked to consider whether the matter is price sensitive and whether any exception applies. In this context, non-executive directors often look to General Counsel to help in making these decisions.

There are different perspectives on continuous disclosure reflecting the different roles of directors and corporate counsel

Corporate counsel survey respondents' views differed markedly from the survey respondents to *Directions 2011* as to whether market participants are disclosing information that does not technically require disclosure and whether this area of the law requires reform.

Directions 2011 revealed that 17% of non-executive directors considered that premature or immaterial disclosure happens "rarely" or "never". On the other hand 44% felt that items that were uncertain or unlikely to be material were still disclosed. The findings for corporate counsel are reversed, with 63% of respondents considering that items are disclosed "rarely" or "never" which did not strictly require disclosure and only 20% considered that items are overdisclosed "sometimes" or "often".

It may be that corporate counsel hold a differing opinion to non-executive directors given General Counsel are often on the frontline of continuous disclosure decisions - the General Counsel is often the first port of call to advise on this issue. The survey results suggest General Counsel might be taking a more conservative view on matters of disclosure, particularly post-GFC and following increased regulatory scrutiny in this area. Indeed, Greg Medcraft's first comments as the new Chairman of ASIC signalled his intention to focus on the dispersal of information that is materially price sensitive, as well as dealing with leaks and insider trading.

64% of non-executive directors survey respondents to *Directions 2011* said that they agreed or strongly agreed that a change to the immediacy element of the continuous disclosure test was required, with many commenting that entities did not have sufficient time to assess information and frame appropriate announcements. On the other hand, continuous disclosure didn't rate highly for corporate counsel as an area in need of urgent law reform - this doesn't reflect that corporate counsel have no concern over the immediacy test, rather it's likely that they are more comfortable because they are in the thick of it. Many have extensive practical experience of dealing with disclosure issues and have grown comfortable with the regime over time.

Recent decisions in Australia illustrate the difficulties and significant obligations placed on directors and officers when discharging their continuous disclosure responsibilities on behalf of corporations.

As was recently highlighted in *James Hardie*, potential liability and responsibility can extend to the General Counsel personally, where he or she is found to be an officer of the company. The New South Wales Court of Appeal held that whether a person is an officer of the company is a question of fact, and will include CFOs and General Counsel who actively participate in the decision making process with the Board of directors.²⁶

There is a greater sense of awareness on paper trails following recent cases

As noted in *Directions 2011*, recent case law makes it clear that the existence of compliance procedures and systems in relation to a company's disclosure obligations are of utmost importance.

Survey respondents' commentary suggests that there is an increased focus on paper trails in-house.

Many survey respondents also noted that there had been a change in procedure as a result of recent cases, noting that more recently there has been a *"greater focus on precise wording of ASX releases, more qualifying language and less definitive statements."*

Interestingly, corporate counsel have *"moved away from seeking written legal advice"* in respect of continuous disclosure matters, and are relying on a more fluid discussion, based on external advisers' experience in advising different corporates.

"The board has certainly been more focused on paper trails for approvals of ASX announcements", with "more robust sign-off processes for price sensitive disclosures" and "more detailed processes and sign offs around disclosures and clearer delegated authorities".

Compass 2011 survey respondent

²⁶ *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331; Jacobs W, Zaki M, "Insufficient evidence sends James Hardie Directors back to the boardrooms", *Insolvency Law Bulletin*, Lexis-Nexis Online, January 2011



CLASS ACTIONS

Class actions are a significant concern for corporate counsel

Since 1992, Australia has had a specific regime supporting class action proceedings, and since then there has been a steady use of the class action framework with Australia seen as having a plaintiff-friendly regime compared to many other countries.²⁷

A number of class actions have been launched by shareholders based on the failure to comply with continuous disclosure obligations (such as *OZ Minerals* and *Sigma Pharmaceuticals*). Australia has also seen significant class actions as a result of investigations by the ACCC (the *Visy/Amcor* cartel) and ASIC (*Nufarm*) as well as actions regarding mass torts and product liability. Shareholders and litigation funders are using class actions as a form of de facto enforcement, whether or not the regulator acts.

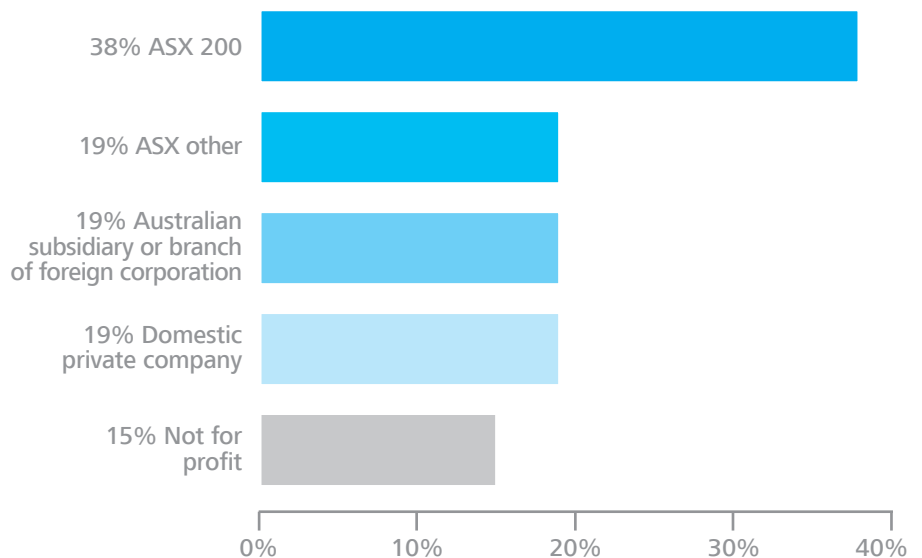
Significantly, 27% of survey respondents considered class actions were an issue for their organisation in the previous 12 months. This concern is shared by all categories of survey respondents.

This level of concern is significant, given that class actions represent less than 1% of all Federal Court proceedings.²⁸

In addition, with 34% of survey respondents' organisations having some involvement in a class action, many corporate counsel are having to consider class action issues from the perspective of both class member and defendant.

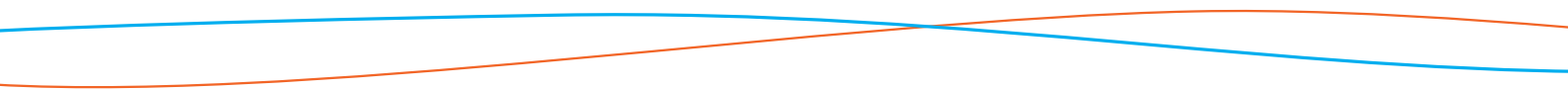
Class actions are a concern to corporate counsel not only because of the possibility of liability and the reputation of the organisation, but also because of the costs of defending a class action. In approving the recent settlement of the *Amcor/Visy* cartel class action, the judge expressed concern at the \$25 million in legal costs forming part of the settlement. However, as the regime enables group members to take the benefit of the cost and other pressures that class actions place on defendants to settle, without having to make any outlay, class actions will remain attractive for individual and institutional group members alike and so continue to raise concerns for corporate counsel.

Have class actions been an issue (by organisation type)?



²⁷ Henry, T, Gatto, D, Stevenson, P, "Australia, The Private Competition Enforcement Review", *Law Business Research*, 2010, page 8

²⁸ Morabito, V, "An empirical study of Australia's class action regimes: second report", September 2010, page 16, at www.buseco.monash.edu.au, accessed on 22 July 2011



“Few topics in recent years have excited as much controversy as litigation funding and, in particular, the rise of entrepreneurial litigation funding... For critics, entrepreneurial litigation is an example of heinous commodification – an anathema that corrupts the court process and the prosecution of claims”.²⁹

Litigation funding

The rise of litigation funding is significant, given the high degree of concern that class actions have generated for corporate counsel. Six ASX listed litigation funders are active in the Australian market, and the number of plaintiff law firms is on the rise, with a number of firms announcing that they are investigating potential class actions. Increasingly, companies and corporate counsel are exposed to the strategies of funders in defending class actions.

In FY2009/10, IMF (Australia) Ltd resolved seven matters to produce a net profit of \$16.8m before tax, and expects to resolve as many as 14 matters by the end of FY2010/11.³⁰

Funded class actions have resulted in some significant settlements for group members, such as the Sons of Gwalia Ltd action which settled for in excess of \$100m³¹ and the proceedings against Aristocrat Leisure Ltd, which resulted in the largest class action settlement to date of \$144.5m.³² However, unfunded actions have also been successful, such as the May 2011 settlement of the Amcor/Visy class action for \$95 million.

²⁹ See the Justice McDougall, *Keynote Address to the NSW Young Lawyers Civil Litigation Seminar*, March 2010, page 16, at www.lawlink.nsw.gov.au accessed on 10 August 2011

³⁰ IMF (Australia) Ltd, Release to Australian Securities Exchange, 13 May 2011, at www.imf.com.au, accessed on 16 June 2011; IMF (Australia) Ltd, Annual Report 2010, at www.imf.com.au, accessed on 16 June 2011

³¹ Mayanja, J, “Enhancing private enforcement of Australia’s corporate continuous disclosure regime: Why unshackling litigation funders makes imminent sense”, *Australian Journal of Corporate Law*, Volume 25, 2010, page 57

³² *Dorajay Pty Ltd v Aristocrat Leisure Ltd*, Federal Court of Australia, NSD 362/2004, 28 August 2008



**BACKGROUND
TO THE
REPORT**

The report

This report examines key issues and challenges facing Australian corporate counsel in 2011. The report reflects our experience and ongoing conversations with corporate counsel on M&A and corporate governance issues.

We have prepared our report in partnership with four General Counsel of some of Australia's largest companies - Nathan Butler (National Australia Bank), Paul Meadows (Wesfarmers), Brian Salter (AMP) and Simon Tuxen (Westfield). We thank each of them for their support and invaluable input. We also express our appreciation to Graham Bradley (Chair, Business Council of Australia) and Paul McClintock (Chair, COAG Reform Council) for their insights on aspects of this report.

The Mallesons team that worked on this report and the survey included Greg Golding, Jason Watts, Joseph Muraca, Daniel Natale, Theo Lefkos, Vanessa Coffey, Peta Stevenson and members of the Mallesons Stephen Jaques Business Development and Marketing Team.

The survey

The report captures the responses of 374 corporate counsel representing more than 250 organisations across a wide variety of industries to an online survey conducted in June 2011. Survey recipients were asked to respond to a variety of multiple choice and free form questions on seven key themes; the role corporate counsel, the business of corporate counsel, regulatory compliance, law reform, executive remuneration, continuous disclosure and class actions.

This survey was initiated by Mallesons to gain a better understanding of the issues and challenges that corporate counsel are facing in Australia today.

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About Mallesons

Mallesons Stephen Jaques is a leading law firm in the Asian region. For over 180 years, the world's leading organisations have entrusted us to advise on their most critical legal challenges. We couple high performance with intellectual rigour to provide legal solutions that are innovative and often ground breaking. This approach enables us to help our clients adapt to the increasingly challenging markets in which they operate - no matter where they are in the world - and ensures that they have a voice to help them shape the legal and regulatory

landscape. To provide our clients with legal advice that makes a difference, we invest in attracting, recruiting, retaining and nurturing the very best talent in all the markets in which we work. We have offices in Australia's major commercial centres, as well as Asia and the UK.

For more information go to: www.mallesons.com
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